

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(2)S
Sales Tax
January 24, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011029A

On October 29, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ronald Webb Builder & Contractor, Inc., 62A Floyd Street, East Hampton, NY 11937.

The issues raised by Petitioner, Ronald Webb Builder & Contractor, Inc., are:

1. Whether certain items or services specified below are considered to be capital improvements.
2. Whether trash removal services purchased with respect to a dumpster located at Petitioner's place of business are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner has performed the following projects for its residential customers:

1. Appliances installed in a complete custom made kitchen renovation.
2. Humidifiers installed in the duct work of a heating system.
3. Installation of a motorized awning.
4. Water damage replacement services.

Descriptions of these projects are given below.

Kitchen Renovation

Petitioner performed a complete custom made kitchen renovation, with all new cabinets made specifically to match the size of all appliances. The following appliances were installed:

- Under the counter dishwasher.
- Refrigerator with unfinished sides installed directly into a specific cabinet intended just for that refrigerator.
- Stainless steel sink.
- Hood mounted into a cabinet and ducted through the cabinets.
- Filter kit as part of the hood unit for exhaust purposes.
- Cook top cut into the counter top.

Removal of any of these appliances would cause damage to the surrounding areas. Holes would be left in cabinets and counter tops and would ruin the integrity of the custom cabinets and counter tops.

Humidifiers

Petitioner installed two humidifiers in the duct work of the heating system. Removal of these humidifiers would leave a hole in the system and ruin the integrity of the surrounding area and would require a complete repair of the area. The units were intended to be a permanent installation and were installed at the time of a complete renovation of the house but not billed until later.

Motorized Awning

On the side of a house Petitioner installed a motorized canvas awning which was bolted in with twelve 1/2" threaded lag bolts, and a wood ledge was installed underneath for support. An electrician wired this unit by drilling a hole through the exterior shingles and running a wire down the wall and ceiling. A box for a switch to operate the unit was also installed. If this unit were to be taken down there would be twelve 1/2" holes in the shingles from the lag bolts that would have to be repaired with shingles that probably would not match the existing shingles and that would ruin the integrity of the surrounding area. The ledge would have to come off damaging the shingles. Holes drilled by the electrician for the unit would be visible, as would the hole left by removal of the special switch. Petitioner's "estimate" for the awning in question provided, in part, the following detailed description of the awning and related service: "Construction and installation of Eastern Sunflex lateral arm awning 18' wide with 14' projection, white hardware, motor with manual over ride right side facing, mount just below third course of shingles:

unit with fabric	\$3,662.00
protective hood and side covers	491.00
530R2MO motor	807.00

* * *

#4630 cadet grey fabric, straight valance with white binding."

Water Damage Replacement

Petitioner was hired by a homeowner to restore part of a house which had been damaged by water, due to broken water pipes. The pipes broke because the water in them froze. Petitioner states that a ceiling and complete wall, including sheetrock and studs, shower and heat ducts, were replaced, and new studs and sheetrock were installed including spackling and painting.

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During the process, pictures and furniture were removed from the area and reinstalled when the work was finished. This service was provided to the homeowner to expedite the restoration work.

Petitioner provided the customer with an invoice for these services as they were completed. The services were detailed as follows:

Vacuum water from floor. Supply fans to dry floor. Remove drywall from bedroom ceiling. Remove duct work in bedroom ceiling to provide access to repair broken pipes. Cut out broken pipes and replace same. Replace duct work and sheetrock ceiling. Cut open wall in entry to access plumbing for bath. Replace broken pipes and shower body. Pressure test piping system hot and cold for any additional leaks. Remove all furnishings from bedroom and entry hall. Remove all photos and paintings from bedroom and hall. Mark off all woodwork. Spackle and paint 2 coats both rooms. Replace wet insulation as needed. Reinstall paintings and photos. Move furnishings back into place. Clean job site and cart away all debris.

A dumpster is kept at Petitioner's shop at all times, for the purpose of disposing of construction debris from various job sites in East Hampton. Petitioner must keep a dumpster at its shop since some work sites have no parking and the East Hampton Code does not allow dumpsters to be left on town property. Also, placing a 40' dumpster on brick, cobble stone, or cement driveways can cause damage. Clients who require this particular service are billed accordingly. As a building company, 99% of Petitioner's work is in building new homes, renovations or additions. There will be times when Petitioner will have to bring construction debris to its shop or other locations for removal. Construction debris must be removed from Petitioner's shop by a sanitation company and taken to a site on Long Island for dumping, since Petitioner is not allowed to dump construction debris at the town dump.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines a "retail sale," in part as follows:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building

on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed....

Section 1101(b)(9)(i) of the Tax Law defines the term "capital improvement" to mean:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter. . . .

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article. . . .

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property. . . . (Emphasis added)

Section 1119(c) of the Tax Law provides:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for

credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine.

Section 527.5(b)(4) of the Sales and Use Tax Regulations provides, in part:

Tax is not imposed on the charge for installation of tangible personal property which, when installed, will be an addition or capital improvement to real property. . . .

Section 527.7 of the Sales and Use Tax Regulations provides, in part:

(a) *Definitions.* (1) Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal

* * *

(b) *Imposition.* (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(2) All services of trash or garbage removal are taxable, whether from inside or outside of a building or vacant land.

* * *

(4) The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable.

* * *

(5) Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Section 528.18 of the Sales and Use Tax Regulations provides, in part:

Tangible personal property sold by a contractor, subcontractor or repairman to a person, other than an organization exempt pursuant to section 1116(a) of the Tax Law, for whom he is adding to, or improving real property, property or land by a capital improvement, is exempt, if the property sold by the contractor, subcontractor or repairman becomes an integral component part of the real property.

Section 541.2(g)(2)(i) of the Sales and Use Tax Regulations provides:

A capital improvement does not include a contract for the sale and installation of tangible personal property which when installed remains tangible personal property.

Section 541.5(b) (2) of the Sales and Use Tax Regulations provides:

Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement.

Section 541.7 of the Sales and Use Tax Regulations provides:

(a) *Services to real property.* A contractor may purchase the service of trash or debris removal without payment of tax as a purchase for resale provided that:

(1) the contractor generated the trash or debris being removed from real property, property or land as a result of the contractor's performance of the service of maintaining, servicing or repairing such real property, property or land;

(2) the contractor's agreement with the owner or authorized occupant of such real property, property or land for whom the contractor performed such service provides that the contractor is responsible to have such trash or debris removed and;

(3) the contractor furnishes to the person performing such trash or debris removal service a properly completed contractor's exempt purchase certificate.

In such circumstances, the contractor's total charges to such owner or authorized occupant for such service of maintaining, servicing or repairing such property and for such trash or debris removal service are subject to tax. However, if the purchaser is an exempt organization described in section 1116(a) of the Tax Law and gives the contractor a properly completed exempt organization certification, then such service would be exempt.

(b) *Capital Improvements.* A contractor may purchase the service of trash or debris removal without payment of tax where:

- (1) the contractor performs work which constitutes a capital improvement, to real property, property or land;
- (2) the contractor generated the trash or debris to be removed from such real property, property or land as a result of such work;
- (3) the contractor obtains a properly completed certificate of capital improvement from the contractor's customer; and
- (4) the contractor or such customer furnishes a copy of such certificate to the person performing such trash or debris removal service.

Since the contractor's purchase of the trash or debris removal service is in conjunction with the performance of a capital improvement, the contractor's total charge to its customer for the capital improvement is not subject to tax.

Opinion

Petitioner installed various appliances as part of a complete custom made kitchen renovation for a customer. New cabinets were made specifically to match the size of all appliances, and the following items were installed: an under the counter dishwasher; a refrigerator with unfinished sides installed directly into a specific cabinet intended just for that refrigerator; a stainless steel sink; a hood mounted into the cabinet and ducted through the cabinets, with a filter kit as part of the hood unit for exhaust purposes; and a cook top cut into the counter top. Removal of any of these appliances would cause damage to the surrounding areas. As a result of removing the appliances, holes would be made in cabinets and counter tops and would ruin the integrity of the custom cabinets and counter tops. Petitioner also installed two humidifiers in the duct work of a heating system. The humidifiers were intended to be a permanent installation, and removal would create a hole in the system that would require a complete repair of the area.

The Department has previously determined that the installation or complete replacement of various built-in appliances and humidifiers constitute capital improvements within the meaning and

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intent of Section 1101(b)(9) of the Tax Law. See New York State and Local Sales and Use Tax Classification of Capital Improvements and Repairs to Real Property, Publication 862 (4/01), at 19. The installation of all of the above items as described by Petitioner meets the criteria of capital improvements as defined in Section 1101(b)(9). Therefore, installation of such appliances and humidifiers would not be subject to the imposition of sales tax in accordance with Sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. Petitioner, however is responsible for the sales tax on its purchases of the appliances, cabinets and materials used in such installation. See Section 1101(b)(4)(i) of the Tax Law.

Petitioner should receive from its customer a Certificate of Capital Improvement (Form ST-124), within 90 days from the date of performing the capital improvement. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

Petitioner installed a motorized awning, the estimate for which describes it as made of fabric. It has been determined that the installation of a canvas awning does not result in a capital improvement in accordance with the meaning and intent of Section 1101(b)(9) of the Tax Law. See Publication 862, supra, at 14; Ms. Ruth Bell, Adv Op Comm T&F, April 19, 1995, TSB-A-95(10)S. Therefore, the sale and installation of such awnings would be subject to the imposition of sales tax under Sections 1105(a) and 1105(c)(3) of the Tax Law.

Petitioner contracted with a homeowner to perform restoration work described as water damage replacement. This service was necessary due to damage caused by a freeze resulting in broken pipes. The invoice on which Petitioner billed the customer for the services describes various replacements and repairs to the damaged areas. Section 527.7 of the Sales and Use Tax Regulations defines maintaining, servicing or repairing real property as the service of keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Petitioner's invoice describes replacement and repair of damaged pipes, and walls and ceilings, which services would generally not qualify as capital improvements. The services as described in the invoice are repairs and replacements necessary to keep the real property in a condition of fitness, efficiency, or readiness and do not substantially add value to the real property within the meaning of Section 1101(b)(9) of the Tax Law. Repair services to real property are subject to sales tax under Section 1105(c)(5) of the Tax Law. Pursuant to Section 1119(c) of the Tax Law, Petitioner may apply for a credit or refund of the sales tax paid on the materials used to complete the taxable repair as an offset against the tax collected from the customer.

Petitioner in its request for an advisory opinion explains that a ceiling and complete wall, including sheetrock and studs, a shower and heat ducts, were replaced. However, the description in Petitioner's invoice does not make clear that the ceiling and wall were completely replaced. If, as stated by Petitioner, a complete wall and ceiling were replaced, then those services would constitute a capital improvement within the meaning of Section 1101(b)(9) of the Tax Law and would not be subject to sales tax. See Publication 862, supra, at 25. Petitioner, however is

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responsible for sales tax on its purchases of materials used in a capital improvement. See Section 527.7(b)(5) of the Sales and Use Tax Regulations.

Whether the water damage replacement services in the present case are a capital improvement is a factual matter that is not susceptible of determination in this Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a specified set of facts. Section 171.24 of the Tax Law; and 20 NYCRR 2376.1(a). Accordingly this Advisory Opinion offers the necessary guidance to be applied to the actual circumstances.

Petitioner keeps a dumpster at its shop at all times for the purpose of disposing of construction debris from job sites. The service of trash or garbage removal is taxable under Section 1105(c)(5) of the Tax Law. As further provided in Section 541.7 of the Sales and Use Tax Regulations, under certain circumstances a contractor may purchase the service of trash or debris removal from a construction site without payment of tax. The trash removal must be done in conjunction with repairs or a capital improvement to the real property under construction. (See Technical Services Division Memorandum, Trash and Debris Removal Services Purchased by Contractors, July 19, 2000, TSB-M-00(5)S.)

Section 541.7(a) of the Sales and Use Tax Regulations provides that a contractor performing a repair to a customer's property, who pursuant to the contract for the performance of such repair is legally obligated to the customer to have the debris resulting from the construction services removed from the property, may purchase such removal services from a trash hauler or subcontractor without payment of tax. Section 541.7(b) of these regulations provides that a contractor performing work which constitutes a capital improvement to a customer's property may purchase the service of trash or debris removal without payment of tax, when the contractor generated the trash or debris to be removed from such property.

Under Section 541.7 of the Sales and Use Tax Regulations, the contractor's purchase of trash removal is exempted from tax as a constituent part of the capital improvement to the realty, or as a purchase for resale of service incorporated into the repair performed on the customer's property. Under the circumstances presented by Petitioner the debris is moved from the site of the customer's property, for which Petitioner has been contracted to complete a capital improvement or repair, to a dumpster located at Petitioner's shop. Petitioner then contracts for the removal of the debris from Petitioner's shop. Though the dumpster at Petitioner's business site may contain construction debris, the trash removal purchased by Petitioner at its business site is not a constituent part of a capital improvement at such site or a service being resold to Petitioner's customer. Petitioner is not purchasing trash removal service as part of a repair or a capital improvement to a job site when paying a trash hauler to empty the dumpster at Petitioner's own place of business.

Petitioner has contracted to have debris removed from its shop, which removal of debris maintains Petitioner's real property in a condition of fitness. As such trash removal services are not

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being provided to property upon which a repair or capital improvement is being performed, the criteria established in Section 541.7 of the Sales and Use Tax Regulations are not met. Accordingly, these services are subject to sales tax as provided for in Section 1105(c)(5) of the Tax Law and Section 527.7(b)(2) of the Sales and Use Tax Regulations.

DATED: January 24, 2003

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.